

CENTER FOR DISABILITY ACCESS
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Andres Gomez,
Plaintiff,

v.

Decker Bullock Dreyfus Inc., A
California
Corporation; Gates Estates, Inc.;
; and Does 1-10,
Defendant.

Case: 3:21-cv-07147-WHA

**Plaintiff's Opposition to Motion
to Dismiss**

Date February 10, 2022
Time 8:00 a.m.
Ctrm 12, 19th Fl.

The Honorable Judge William Alsup

I. Nexus.

Defendant claims that Plaintiff did not allege a nexus between Defendant's website and a place of public accommodation. However, Plaintiff has alleged just that. "The Website is a nexus between Decker Bullock Dreyfus Inc. customers and the terrestrial based privileges, goods or services offered by "Decker Bullock Dreyfus Inc" Complaint, Dkt. 1, para. 16. Plaintiff further alleges: "Decker Bullock Dreyfus Inc". offers websites and digital booking as some of the facilities, privileges, and advantages offered by Defendants to patrons of the Real Estate in connection with their patronage at the Real Estate, Complaint, Dkt. 1, para. 14. Plaintiff alleges that he went to the site as a prospective customer, intent get information about houses on sale in Northern California. Complaint, Dkt. 1, paras. 17-18. Finally, Plaintiff pleads that when he attempted to navigate the Website, he encountered numerous accessibility design faults that prevented him from navigating the site successfully using SRS. This caused Plaintiff to experience difficulty and confusion navigating the numerous inaccessible elements. As a result of this inaccessibility, he was unable to understand the content and was deterred from further use of the Website. Complaint, Dkt. 1, paras. 20-21.

This more than satisfies the pleading standard to achieve standing. In *Robles v. Domino's Pizza, LLC* 913 F.3d 898 (9th Cir. 2019), the Court rejected the argument that websites are not governed by the ADA, and held the ADA "applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." *Id.* at 905. The Court also held that the inaccessibility of Domino's

1 website impedes the access of goods and *services* provided by the chain. *Id.*
2 at 905.

3 The nexus between the website and the service Defendant provides
4 is critical. Here, the website appears to be an advertisement for its services
5 and it allows persons to gather information about the services provided.
6 The website steers business to the Defendant.

7
8 Domino's website and app facilitate access to the goods and
9 services of a place of public accommodation—Domino's
10 physical restaurants. They are two of the primary (and heavily
11 advertised) means of ordering Domino's products to be picked
12 up at or delivered from Domino's restaurants. We agree with the
13 district court in this case—and the many other district courts
14 that have confronted this issue in similar contexts—that the
15 ADA applies to Domino's website and app, which connect
16 customers to the goods and services of Domino's physical
17 restaurants.

18 *Id.* at 905-906. The result should be no different here. The services that
19 Defendant promotes and advertises are performed at physical locations
20 that are owned and operated by Defendant. The main way to access
21 Defendant's services is via its website.

22 Congress enacted the ADA "to provide a clear and comprehensive
23 national mandate for the elimination of discrimination against individuals
24 with disabilities." 42 U.S.C. § 12101(b)(1). Pursuant to Title III of the ADA,
25 "[n]o individual shall be discriminated against on the basis of disability in
26 the full and equal enjoyment of the goods, services, facilities, privileges,
27 advantages, or accommodation of any place of public accommodation by any
28 person who owns, leases (or leases to), or operates a place of public
accommodation." 42 U.S.C. § 12182(a).

1 The Ninth Circuit has explained that the phrase “place of public
 2 accommodation” refers to a “physical place.” *Weyer v. Twentieth Century Fox*
 3 *Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). However, “[t]he
 4 requirement that a place of public accommodation refer to
 5 a physical place...does not preclude a plaintiff from challenging a business’
 6 online offerings.” *Reed v. CVS Pharmacy, Inc.*, 17-CV-3877, 2017 WL
 7 4457508, at *3 (C.D. Cal. Oct. 3, 2017). “So long as there is a ‘nexus’ - that is,
 8 ‘some connection between the good or service complained of and an
 9 actual physical place’ - a plaintiff may challenge the digital offerings of an
 10 otherwise physical business.” *Id.* (citing *Weyer*, 198 F.3d at 1114). In other
 11 words, the ADA “applies to the services *of* a place of public accommodation,
 12 not service *in* a place of public accommodation. To limit the ADA to
 13 discrimination in the provision of services occurring on the premises of a
 14 public accommodation would contradict the plain language of the
 15 statute.” *Id.* (emphasis in original) (citing *Nat’l Fed’n of the Blind v. Target*
 16 *Corp.*, 452 F. Supp. 2d 946, 953 (N.D. Cal. 2006)). This construction was also
 17 adopted by the Ninth Circuit in *Robles*. The Department of Justice has
 18 “repeatedly affirmed that Title III [of the ADA] applies to websites that meet
 19 the definition of public accommodation.” *Gorecki v. Hobby Lobby Stores, Inc.*,
 20 17-CV-1131, 2017 WL 2957736, at *4 (C.D. Cal. June 15, 2017).

21 Courts have distinguished between websites that purely have an
 22 online presence, such as Facebook or Twitter, and businesses such as the
 23 one that is the subject of this matter.

24
 25 While the Court acknowledges that a website in and of itself
 26 is not a place of public accommodation under the ADA, the
 27 Ninth Circuit has distinguished between a stand alone
 28 website, and a website that has a nexus to
 a physical location. For example, Defendant cites to *Young v.*
Facebook, Inc., 790 F. Supp. 2d 1110, 1115, (N.D. Cal. 2011)

1 for its argument that Defendant's website is not subject to
 2 the ADA. However, in Young, the court held that "Facebook
 3 operates only in cyberspace, and thus is not a 'place of public
 4 accommodation' as construed by the Ninth Circuit." Id. at
 5 1114. The court noted that "[w]hile Facebook's headquarters
 6 is obviously a physical space, it is not a place where the online
 7 services to which Young claims she was denied access are
 8 offered to the public." Id. This is distinguishable from the
 9 situation here, where Plaintiffs have demonstrated a nexus
 10 between the alleged discrimination on Defendant's website
 11 and Defendant's physical place of public accommodation.
 12 Under this framework, the Court finds that Title III of
 13 the ADA applies to Defendant's website.

14 *Haggar v. Ashley Furniture Indus., Inc.*, No. LACV1901266 PAJ CX, 2019 WL
 15 8886026, at *3 (C.D. Cal. Dec. 12, 2019).

16 Here, Plaintiff clearly pleads a nexus to a physical location. He pleads
 17 that the real estate agency is a "brick and mortar" facility, and that the
 18 website offers information about the various services offered. The ADA
 19 simply requires that a business provide auxiliary aids to ensure effective
 20 communication with the disabled.

21 "Discrimination" under the ADA encompasses the denial of
 22 the opportunity, by the disabled, to participate in programs or
 23 services, and providing the disabled with separate, but
 24 unequal, goods or services. *See* 42 U.S.C. § 12182(b)(1)(A)(i-
 25 iii). To ensure that the disabled have full and equal enjoyment
 26 of the goods and services of places of public accommodation,
 27 the ADA requires "reasonable modification" of "policies,
 28 practices, and procedures," the provision of auxiliary aids to
 ensure effective communication with the disabled, and the
 removal of architectural and communications barriers. 42
 U.S.C. § 12182(b)(2)(A)(ii-iv). The ADA thus departs from
 certain anti-discrimination statutes in requiring that places of
 public accommodation take affirmative steps to
 accommodate the disabled.

1 *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 951 (N.D. Cal.
2 2006).

3 In this day and age, when virtually every business has an online
4 presence, does it make sense that Defendant would be able to offer an
5 inaccessible website to the public?

6 Defendant argues that the ADA does not cover a website unless the
7 website itself allows a person to purchase goods or services. This is not the
8 law. The *Robles* case specifically did not rule on that point: “We need not
9 decide whether the ADA covers the websites or apps of a physical place of
10 public accommodation where their inaccessibility does not impede access
11 to the goods and services of a physical location.” *Robles v. Domino's Pizza,*
12 *LLC*, 913 F.3d 898, 905 (9th Cir.), cert. denied, (2019).

13
14 **II. THE WEBSITE IS A PLACE OF PUBLIC ACCOMMODATION AND**
15 **INDEPENDENTLY COVERED BY THE AMERICANS WITH**
16 **DISABILITIES ACT**

17 Defendant’s website clearly provides a benefit to its customers. The
18 website is informational and intended to advertise its business. While
19 Defendant dismissively suggests that these are not sufficient to require
20 them to be made accessible, this plainly fails the standards set by the ADA.
21 The question is not whether Mr. Gomez can establish that Defendants
22 conduct **all** of their business in their Brick-and-Mortar office – a Real Estate
23 Agency naturally does not do this as they are often out at showings, etc. -
24 but merely if the website is one of the “goods, services, facilities, privileges,
25 advantages, or accommodations” of a place of public accommodation. 42
26 U.S.C. § 12182(a).

27 The defense argues that Plaintiff’s claims fail because his Complaint
28 (1) does not establish a connection between the Website and a physical
location, and (2) does not plead a “deterrence” or “intent to return” to the

1 physical location.¹ However, each of Defendant's arguments fail for several
 2 reasons. Additionally, Plaintiff can simply amend the complaint to cure any
 3 defects, should this court find this necessary.

4
 5 **A. Contrary to Defendant's suggestion, California does not require a**
 6 **"nexus" to a physical brick and mortar facility.**

7 No California Court of Appeal has rejected the application of the ADA
 8 to a case involving a website. To the contrary, each published decision on
 9 the topic has found the ADA to apply and declined to answer hypotheticals
 10 outside the question before the court. In *Thurston v. Midvale*, 39
 11 Cal.App.5th 634 (2019), the Cal. Court of Appeal recognized a three-way
 12 split between the various federal circuits. Rejecting the narrowest view
 13 that no website services are covered, it found that as a service of a place of
 14 public accommodation, the site was covered. *Id.* at 644. The court did not
 15 decide whether a website disconnected from a physical place would be
 16 covered. "[W]e need not consider the wholly hypothetical question
 17 whether Title III of the ADA governs a website unconnected to a physical
 18 place of public accommodation offering purely Internet-based services or
 19 products." *Ibid.* Defendant cites to another subsequent decision, *SDCCU*, to
 20 assert the Court of Appeal has taken a position on this issue. This is
 21 inaccurate. *SDCCU* also discussed the various approaches that have been
 22 taken with respect to the ADA and websites, sorting them from the most
 23 restrictive to the broadest applications of the law. *Martinez v. San Diego*
 24 *County Credit Union*, 50 Cal.App.5th 1048, 1062 (2020).

25 This time, the does not even consider that websites might not be
 26 covered by the ADA. *SDCCU*, like the court in *Midvale*, applied the facts and
 27 only reached a holding necessary to resolve the case, finding that there was

28
¹ Def. Memorandum., pp. 9-13.

1 a nexus between the website and the physical place. However, the court did
 2 *not* establish a nexus was required. *Id.* at 617. Explicitly rejecting this
 3 conclusion, the court explains “we do not reach the legal issue whether the
 4 ADA applies to websites even without a nexus to a physical place.” *Ibid.*

5 Contrary to Defendant’s suggestion, the application of the ADA to
 6 websites is an explicitly open question in California and trial courts
 7 interpreting the question have found in favor of plaintiffs on this issue.

8 9 **1. The internet is an accessibility tool**

10 When most people hear the phrase “ADA” it evokes the “International
 11 Symbol of Accessibility.”



17 *Figure 1- The ISA logo,*
 18 *depicting a stick figure using a*
 19 *wheelchair has been in use since*
 20 *1968.*

21 This image, depicting a stick figure representation of a human being
 22 using a wheelchair, is the literal visual representation of “accessibility.” This
 23 public perception that the ADA is about mobility feeds into one frequent
 24 criticism that the ADA over-focuses on mobility disabilities and that other,
 25 less visible, disabilities are left excluded. The web is no exception to this.
 26 Aside from the wheelchair itself, the internet is likely the greatest
 27 accessibility tool to those with mobility limitations in existence. Giving
 28 access to markets and information without the need to leave home, the
 internet is a life changer.

1 "People with disabilities have found the internet a real boost
 2 because it helps to make life easier by providing online access
 3 to services such as banking and food shopping, and also gives
 4 them the ability to network with other people who are in the
 same situation as themselves," he says. "Isolation can be an
 issue, but the advent of support groups means people can join
 an online community from the comfort of their own home." –
 Alex Barker²

5 "To have an opportunity to communicate with others,
 6 research information and find entertainment, all from the
 7 comfort of your home, makes the internet a true blessing for
 those with physical limitations," – Jay Cohen, founder of
 www.disabledonline.com³

8
 9 It's a game changer, that is, assuming you can use it fully. For those
 10 without the ability to see, the limitless access to information becomes a
 11 barrier itself unless attention is paid to the screen readers. Similarly, for
 12 those with hearing disabilities, like Langer, the virtually limitless pool of
 13 information is limited. The fastest emerging information mediums online
 14 include Youtube and TikTok. What used to exist in written blogs now are
 15 frequently moved to video instructionals. Without closed captioning, those
 16 that previously relied on the internet for access to information find
 17 themselves cut off.

18 Excluding the internet from the ADA not only undermines the
 19 intention of the law to include all people within the economy, but also
 20 undermines the internet itself as a bastion of democratized information by
 21 limiting only to those able to access it. In 2016, the United Nations passed
 22 a resolution recognizing that internet access is a human right.⁴ But in
 23 California in 2021, we're still arguing whether or not people with
 24 disabilities deserve access to those rights.

25
 26 ² [https://www.techradar.com/news/internet/how-the-web-is-improving-the-](https://www.techradar.com/news/internet/how-the-web-is-improving-the-lives-of-disabled-computer-users-684644)
 27 [lives-of-disabled-computer-users-684644.](https://www.techradar.com/news/internet/how-the-web-is-improving-the-lives-of-disabled-computer-users-684644)

28 ³ *Id.*

⁴ General Assembly Resolution 38, *The promotion, protection and enjoyment of human rights on the Internet* A/HRC/38/L.10/Rev.1 (4 July 2018)

1 ***2.The ADA applies to websites that interact with interstate commerce.***

2 “Congress enacted the ADA in 1990 to remedy widespread
3 discrimination against disabled individuals.” *PGA Tour, Inc. v. Martin*, 532
4 U.S. 661, 674 (2001). As remedial legislation, the Supreme Court instructs
5 that it must be construed broadly to effectuate its purpose. *Tcherepnin v.*
6 *Knight*, 389 U.S. 332, 336 (1967); *Fortyune v. City of Lomita*, 766 F.3d 1098,
7 1101 (9th Cir. 2014). The view advanced by the Defendant dates back to
8 the year 2000. *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104
9 (9th Cir. 2000). In the year 2000, the internet as we know it today simply
10 did not exist. Ecommerce was in its infancy. Netflix was a mail-order disc
11 exchange. Amazon had not yet posted a profit. Mark Zuckerberg was in high
12 school. *Peanuts* was still in in daily circulation in *print newspapers*. Mobile
13 phones had just started to take off as a mainstream consumer device, and
14 the iPhone — or smartphones of any kind — didn’t exist yet.

15 Put simply, the world that the Ninth Circuit was evaluating with
16 respect to the ADA in 2000 had more in common with the VCR than it does
17 the economy that exists today. This is important, because one of the phrases
18 that was being interpreted in the statute was whether or not the operations
19 of an entity “affect commerce.” 42 U.S.C. § 12181(7). What it meant to be a
20 digital “place” was effectively a nonsensical question. In 2000, *Weyer* took
21 a conservative approach to the issue, but the reality of that case was that
22 the website wasn’t the type of entities included in § 12182(7)(A)-(L). It was
23 an employee benefits program offered from an employer. *Weyer, supra*, 198
24 F.3d 1104. By contrast, a public facing business, such as a landscaping
25 company, is undoubtedly a “service establishment” specifically enumerated
26 by the statute. 42 U.S.C. § 12181(7)(F).

27 The DOJ has taken the position that the ADA applies to the Internet
28 and web-based goods and service providers. *Justice Department Reaches*

1 *Settlement with edX Inc., Provider of Massive Open Online Courses, to Make*
 2 *its Website, Online Platform and Mobile Applications Accessible Under the*
 3 *Americans with Disabilities Act*, DEPT. JUST.: OFF. PUB. AFF. (Apr. 2, 2015),
 4 [http://www.justice.gov/opa/pr/justice-department-reaches-settlement-](http://www.justice.gov/opa/pr/justice-department-reaches-settlement-edx-inc-provider-massive-open-online-courses-make-its)
 5 [edx-inc-provider-massive-open-online-courses-make-its](http://www.justice.gov/opa/pr/justice-department-reaches-settlement-edx-inc-provider-massive-open-online-courses-make-its)
 6 [<https://perma.cc/AGU6-V3YZ>].⁵

7 *See, e.g.*, Letter from Deval L. Patrick, Assistant Att'y Gen., to Senator
 8 Tom Harkin (Sept. 9, 1996) (“Covered entities under the ADA are **required**
 9 **to provide effective communication**, regardless of whether they
 10 generally communicate through print media, audio media, or
 11 **computerized media such as the Internet.**”)(emphasis
 12 added); *Applicability of the Americans with Disabilities Act (ADA) to Private*
 13 *Internet Sites: Hearing before the House Subcommittee on the Constitution of*
 14 *the House Committee on the Judiciary*, 106th Cong., 2d Sess. 65–010 (2000)
 15 (“It is the opinion of the Department of Justice currently that the
 16 accessibility requirements of the Americans with Disabilities Act **already**
 17 **apply** to private Internet Web sites and services.”)(emphasis added); 75
 18 Fed.Reg. 43460–01 (July 6, 2010) (“The Department believes that title III
 19 reaches the Web sites of entities that provide goods or services that fall
 20 within the 12 categories of ‘public accommodations,’ as defined by the
 21 statute and regulations.”).

22 As seen above, Congress considered amending the ADA to include
 23 websites and determined it wasn’t necessary, as the original law was
 24 expected to keep pace with technology. H.R. Rep. 101–485(II), at 108, 1990

25
 26 ⁵ The settlement required edX to modify its website, platform, and mobile
 27 applications to conform to Web Content Accessibility Guidelines (WCAG)
 28 2.0 AA, industry guidelines for making web content accessible to users
 with disabilities. *Id.* For a discussion of the guidelines, see *infra* notes 85-
 106 and accompanying text.

1 U.S.C.C.A.N. 303, 391 (1990) (“[T]he Committee intends that the types of
 2 accommodation and services provided to individuals with disabilities ...
 3 should keep pace with the rapidly changing technology of the times.”); H.R.
 4 Rep. 101–485(II), at 100, 1990 U.S.C.C.A.N. 303, 383 (1990)(“The
 5 Committee intends that the ‘other similar’ terminology should be
 6 construed liberally, consistent with the intent of the legislation that people
 7 with disabilities should have equal access to the array of establishments
 8 that are available to others who do not currently have disabilities.”).

9 Specifically, the original legislative history report notes that an
 10 important area of concern is information exchange and although there
 11 were “still substantial barriers,” that “great strides are being made.” *Id.*;
 12 *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 574 (D. Vt. 2015).
 13 “It seems likely that making websites [compliant] is the kind of advanced
 14 technology Congress was envisioning.” *Ibid.*

15 ***3.The Ninth Circuit “nexus test” is under significant criticism.***

16 As this case is pending in the Superior Court, it is under no obligation
 17 to defer to the Ninth Circuit interpretation of the ADA. Other courts
 18 evaluating the Ninth Circuit *Weyer* interpretation have not treated it kindly,
 19 and it is unlikely that the decision will continue to age any more gracefully
 20 than it has. Indeed, given the multiple competing interpretations, and the
 21 serious doubt as to the long-term value of the Ninth Circuit approach,
 22 following it is not rational to defer to it when it conflicts with California’s
 23 individual interest in being at the vanguard of civil rights, given the
 24 presence of more appropriate interpretations that provide for protecting
 25 civil rights.

26 “In a society in which business is increasingly conducted online,
 27 excluding businesses that sell services through the Internet from the ADA
 28

1 would run afoul of the purposes of the ADA and would severely frustrate
 2 Congress's intent that individuals with disabilities fully enjoy the goods,
 3 services, privileges and advantages, available indiscriminately to other
 4 members of the general public.” *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F.
 5 Supp. 2d 196, 200 (D. Mass. 2012) *quoting Carparts Distribution Center, Inc.*
 6 *v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1994).

7 As Representative Nadler put it, when the ADA was enacted:

8 [W]e were not communicating by e-mail, blog, or tweet; we
 9 were not filling virtual shopping carts with clothes, books,
 10 music, and food; we weren’t banking, renewing our driver’s
 11 licenses, paying taxes or registering for and taking classes
 12 online. Congress could not have foreseen these advances in
 13 technology. Despite Congress’ great cognitive powers, it could
 14 not have foreseen these advances in technology which are
 15 now an integral part of our daily lives. Yet Congress
 16 understood that the world around us would change and
 17 believed that the nondiscrimination mandate contained in the
 18 ADA should be broad and flexible enough to keep pace.

14 *Achieving the Promises of the Americans with Disabilities Act in the*
 15 *Digital Age—Current Issues, Challenges and Opportunities: Hearing before*
 16 *the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the*
 17 *House Comm. on the Judiciary*, 111th Cong., 2d Sess. 111–95 (2010).

18 One District Court in the First Circuit, calling the approach “absurd”
 19 that business, such as a landscaper that provides services at individual
 20 homes would not be covered under the “nexus” test rejected the argument:

21 ADA covers the services ‘of’ a public accommodation, not
 22 services “at” or “in” a public accommodation. 42 U.S.C. §
 23 12182(a). This distinction is crucial. Consequently, while the
 24 home is not itself a place of public accommodation, entities
 25 that provide services in the home may qualify as place of
 26 public accommodation. Under Defendant’s reading of the
 27 statute, many businesses that provide services to a customer’s
 28 home—such as plumbers, pizza delivery services, or moving
 companies—would be exempt from the ADA. The First Circuit
 held in *Carparts* that such an interpretation is absurd. Under
 the *Carparts* decision, *the Watch Instantly web site is a place of*
public accommodation and Defendant may not discriminate in
the provision of the services of that public accommodation—

1 *streaming video—even if those services are accessed exclusively*
 2 *in the home.*

3 Mail order businesses being covered by the ADA is the law of the land
 4 in the First Circuit and has been since as early as 1994. *Carparts*
 5 *Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England,*
 6 *Inc.*, 37 F.3d 12, 19-20 (1st Cir. 1994). The Seventh Circuit also follows this
 7 sensible approach. *Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th
 8 Cir. 1999). The Second Circuit similarly agrees. *Pallozzi v. Allstate Life Ins.*
 9 *Co.*, 198 F.3d 28 (2d Cir. 1999).

10 At the end of the day, the parties are asking this court to take a
 11 position on whether an explicitly discriminatory practice is protected by
 12 the law. The law provides a provision to allow the practice to be prohibited,
 13 but the Defendant asks this court to read it narrowly to allow
 14 discrimination. With virtually endless support, and the specter of history
 15 looking back on these other decisions, this court should decline.

16 ***4. California, a leader in technology and the crucible for internet***
 17 ***innovation, must protect the rights of all its citizens.***

18 California courts have found no difficulty applying equal access
 19 standards to internet services. *Martinez v. Kydia*, MCC1900691 (December
 20 9, 2019)(Minute Order Denying Motion to Dismiss in case based on
 21 internet based business, citing to *Thurston* and explicitly rejecting *Robles*);
 22 *White v. Square, Inc.*, 7 Cal.5th 1019, 1027 (2019)(plaintiff alleging denial
 23 of equal access by a website has standing to sue internet-based business).

24 The internet economy as we know it calls California home. Silicon
 25 Valley is the birthplace of technological innovation. From the electric
 26 wheelchair to hearing aids, vaccines, and more, technology has been a boon
 27 to those with disabilities, providing access to places, people and things that
 28 would have excluded them previously. As noted above, the internet itself is
 an amazing accessibility tool for those that can use it. However, an

1 interpretation of equal access that excludes the fastest growing avenue of
2 access to information and the economy to those with disabilities runs
3 counter to the promise of technology improving access.

4 California cannot simultaneously maintain its position at the
5 vanguard of civil rights guarantees in the country, while courting
6 technology promising to usher us into a modern renaissance unless those
7 technologies are inclusive of all its citizens. The ADA is written in a way,
8 and with a stated intent, that intended to keep up with technology. The
9 courts of California should not interpret it narrowly, in violation of a
10 Supreme Court mandate that remedial statutes be interpreted broadly, and
11 in contravention of California's own stated intention to be on the forefront
12 of civil rights.

13
14 **B. Even under the narrower view, the website is a nexus to Defendant's**
15 **terrestrial business.**

16 Notwithstanding the above, Plaintiff's Complaint does address the
17 "nexus" requirement in *Weyer* and *Robles*. In *Weyer* and *Robles*, the Ninth
18 Circuit held that there must be "some connection between the good or
19 service complained of and an actual physical place." For example, in *Robles*,
20 the court found that "Domino's website and app facilitate access to the
21 goods and services of a place of public accommodation—Domino's physical
22 restaurants." *Robles v. Domino's Pizza, LLC*, 913 F.3d at 905. Therefore, "the
23 ADA applies to Domino's website and app, which connect customers to
24 [Domino's] goods and services." *Id.* at 905-906. The "nexus" test does not
25 ask if the website is itself an independent public accommodation that is
26 also attached to a physical place of public accommodation. *Robles*
27 recognizes that all services *of* a place of public accommodation must be
28 compliant, and if a website is a service of that covered place, it must be

1 compliant as well. *Id.* at 905. The nexus test is simply a test of whether the
2 website is such a service.

3 *Robles* did not contain a subjective qualifier. A nexus exists or it does
4 not. There is no question that all terrestrial business must comply with the
5 ADA. The entire point of the “nexus test” is to decide whether the website
6 is one of the “goods, services, facilities, privileges, advantages, or
7 accommodations” of a place of public accommodation. 42 U.S.C. §
8 12182(a); *Robles*, 913 F.3d 898 at 906. Here, Defendants do maintain a
9 terrestrial business, and the website is one of its covered benefits:

- 10 - Defendants do offer terrestrial services.
- 11 - Defendants do conduct business out of the physical place.
- 12 - The website does allow customers to obtain information about those
13 terrestrial services.

14 Defendant claims that plaintiff’s ADA claim squarely fails because
15 Defendant has no physical place of public accommodation is false. Not only
16 does Defendant maintain a physical office at the address listed on their
17 website, but they conduct business in the field, like any realtor would. This
18 does not weaken Plaintiff’s nexus argument in any way. The Napa Home
19 Team is a place of public accommodation, and their website is one of the
20 services, facilities, advantages, privileges or accommodation of that
21 business by facilitates access to Defendant’s physical business and
22 services.
23

24 **I. THE DEFENDANTS’ JURISDICTIONAL CHALLENGE** 25 **IS INAPPROPRIATE AS A 12(B)(1) MOTION**

26 “There is an important difference between Rule 12(b)(1) motions
27 attacking the complaint on its face and those that rely on extrinsic
28 evidence. In ruling on the former, courts must accept the allegations of the

1 complaint as true.” *Kohler v. CJP, Ltd.*, 818 F. Supp. 2d 1169, 1172 (C.D.
2 Cal. 2011).

3 Here, the defense has moved for dismissal on the basis that the court
4 lacks subject matter jurisdiction. Dismissal for lack of subject matter
5 jurisdiction in a case premised on federal-question jurisdiction is
6 “exceptional.” *Sun Valley Gasoline, Inc. v. Ernst Enter., Inc.*, 711 F.2d 138,
7 140 (9th Cir. 1983).

8 The defense motion to dismiss for lack of jurisdiction is based
9 entirely on the claim that the defendants’ website has always complied
10 with the ADA, or is not subject to the ADA, and, therefore, there is nothing
11 for the court to enjoin under the federal statute. While it is appropriate in
12 certain circumstances to bring a motion under Federal Rule of Civil
13 Procedure 12(b)(1) introducing extrinsic facts and challenging federal
14 court jurisdiction, it is not appropriate in the present case with the present
15 motion.

16 The problem with the defendants’ motion is that the very question
17 this Court needs to address in determining whether it has jurisdiction is
18 the same question that must be answered to determine the merits of the
19 case and whether plaintiff can prove his claims. Plaintiff alleges that the
20 defendants’ website does not comply with state and federal accessibility
21 laws. If that is true, the plaintiff wins and can obtain the injunction. If that
22 is wrong, the plaintiff loses. That is the case. The ultimate question in this
23 case is whether the defendants’ website complies with accessibility laws,
24 and is subject to accessibility laws. The defendant, however, asks this
25 Court to answer that very question in determining whether it has
26 jurisdiction. This is improper.

27 The Ninth Circuit has cautioned that courts should not apply
28 Federal Rule of Civil Procedure 12(b)(1) or 12(h)(3) when, as it is here,

1 the issue of jurisdiction is intertwined with the merits of a claim. *See Sun*
2 *Valley Gasoline*, 711 F.2d at 139-40; *Safe Air for Everyone v. Meyer*, 373
3 F.3d 1035, 1039 (9th Cir. 2004); *Robert v. Corrothers*, 812 F.2d 1173,
4 1177 (9th Cir. 1987) (“The relatively expansive standards of a 12(b)(1)
5 motion are not appropriate for determining jurisdiction in a case . . . where
6 issues of jurisdiction and substance are intertwined. A court may not
7 resolve genuinely disputed facts where ‘the question of jurisdiction is
8 dependent on the resolution of factual issues going to the merits.’”) (citation omitted); *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir.
9 1987) (“[I]f the jurisdictional issue and substantive claims are so
10 intertwined that resolution of the jurisdictional question is dependent on
11 factual issues going to the merits, the district court should employ the
12 standard applicable to a motion for summary judgment and grant the
13 motion to dismiss for lack of jurisdiction only if the material jurisdictional
14 facts are not in dispute and the moving party is entitled to prevail as a
15 matter of law Otherwise, the intertwined jurisdictional facts must be
16 resolved at trial by the trier of fact.”); *Rosales v. United States*, 824 F.2d
17 799, 803 (9th Cir. 1987) (“A district court may hear evidence and make
18 findings of fact necessary to rule on the subject matter jurisdiction
19 question prior to trial, *if the jurisdictional facts are not intertwined with*
20 *the merits.*”).

22 Where the jurisdictional facts are intertwined with the merits, a
23 Rule 56 “summary judgment standard” applies. *Roberts*, 812 F.2d at 1177;
24 *Careau Grp. v. United Farm Workers of Am., AFL-CIO*, 940 F.2d 1291,
25 1293 (9th Cir. 1991). The question of jurisdiction and the merits of an
26 action are considered intertwined where the same statute provides the
27 basis for both the subject matter jurisdiction of the federal court and the
28 plaintiff’s substantive claim for relief. *Sun Valley*, 711 F.2d at 1138. The

1 defense can and should bring its claims in the form of a Rule 56 motion.⁶
 2 Plaintiff also would need to conduct discovery in preparation for a Rule
 3 56 motion, including written discovery and depositions, especially a
 4 deposition of Elisabeth Bertolucci.

5 Simply put, this Court should not dismiss the action at this juncture
 6 because the jurisdictional analysis is coextensive with the merits of
 7 Plaintiff's ADA claim and a factual dispute exists as to the alleged
 8 corrections.

9 **II. Supplemental jurisdiction.**

10 Even if the Court dismisses the federal claim, the Court should retain
 11 supplemental jurisdiction over Plaintiff's state claim. This is routinely done
 12 in ADA cases where the federal claim is mooted. Should federal claims be
 13 eliminated in a matter where the court had exercised supplemental
 14 jurisdiction, the court should balance the factors of judicial economy,
 15 convenience, fairness and comity in determining in determining whether
 16 to continue whether to continue to exercise such jurisdiction. *Carnegie-*
 17 *Mellon Univ. v. Cohill*, 484 U.S. 343 (1988).

18 Numerous courts have found the exercise of supplemental
 19 jurisdiction over state law claims related to an ADA claim proper,
 20 emphasizing that the burdens of proof and standards of liability are
 21 identical for ADA and Unruh Act claims. *See, e.g., Chapman v. Pier 1 Imports*
 22 *(U.S.) Inc.*, 2011 U.S. Dist. LEXIS 93451 at *20 (E.D. Cal. 2011); *Johnson v.*
 23 *United Rental Northwest, Inc.*, 2011 U.S. Dist. LEXIS 77027 at *8 (E.D. Cal.
 24

25 ⁶ Additionally, the Court could convert the motion to a summary judgment
 26 motion but given the fact that this case is at its earliest stage, discovery
 27 has not even begun, a summary judgment motion would be premature
 28 and unfair. Had plaintiff been given notice of a motion for summary
 judgment, he would be in a position to file a Rule 56(d) request for
 continuance of denial.

1 2011); *Johnson v. Makinen*, 2009 U.S. Dist. LEXIS 60850 at *7 (E.D. Cal.
2 2009); *Johnson v. Cala Stevens Creek/Monroe, LLC* 401 F.Supp.3d, 904, 906
3 (N.D. Cal. 2019); *Johnson v. Rai Rocklin Investments, LLC*, 2017 WL 3421848,
4 *1 (E.D. Cal. 2017); *See also, Lentini v. Cal. Center for the Arts, Escondido*, 370
5 F.3d 837 (9th Cir. 2004) (upholding district court's award under the Unruh
6 Act without discussion of subject matter jurisdiction.)
7

8 **V. Conclusion.**

9 Plaintiff respectfully requests that the Court deny the motion. If,
10 however, the Court is inclined to grant the motion, then Plaintiff request
11 leave to amend.
12
13

14 Dated: December 27, 2021

CENTER FOR DISABILITY ACCESS

15 By: /s/ Ariel Vento

16 Ariel Vento, Esq.

17 Attorneys for Plaintiff
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